

California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman and Commissioners Downey, Knox, Scott and Swanson

From: Mark Krausse, Senior Commission Counsel
Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

Re: Proposition 34 Regulations: Transfer and Attribution (§85306) – Emergency Adoption
Discussion of Proposed Regulation 18536

Date: July 2, 2001

I. Introduction and Background

This regulation is before the Commission for emergency adoption. This memo addresses issues assigned to staff or otherwise left unresolved at the Commission's May pre-notice discussion.¹

Matters Already Decided

The Commission made the following decisions regarding proposed Regulation 18536 at its May meeting: 1) The terms "last-in, first out" (LIFO) and "first in, first out" (FIFO) were defined under what was characterized as "the layperson approach"; 2) A committee wishing to transfer funds to a committee for an elective state office must make the election between LIFO and FIFO at the time of the initial transfer for all transfers from that committee; and 3) an elective state office committee may receive via transfer an amount per contributor equal to the amount the committee could have received under Section 85318 (authority to collect a contribution for the general election prior to the primary election). In addition, several language changes, including the deletion of redundant references to Section 85306, have been incorporated in the attached draft Regulation 18536.

Matters to be Resolved

The Commission assigned several issues to staff for further drafting. The Franchise Tax Board and the regulated community raised additional concerns, which are addressed in the regulation. Each of these matters is discussed in the decision points below.

¹The Commission held a pre-notice discussion of this regulation in May. This memo was presented to the Commission in largely the same form at the June meeting, where it was not discussed. Since that time, the staff has made further clarifying changes to the proposed regulation, which are reflected in this memo. The regulation is now before the Commission for emergency adoption in order to provide the regulated community with adequate notice of the disclosure requirements applicable to transfers.

New language to describe attribution. Lines 20 through 27 on page 1 were added to better describe how attribution operates by specifying that the amount attributed to a given contributor must be lesser of 1) the amount originally given, 2) the applicable contribution limit, or 3) the amount of unattributed funds remaining to be transferred.

Record keeping requirements. Subsequent to the Commission's last discussion of this proposed regulation, the Enforcement Division and the Franchise Tax Board expressed concern that the draft regulation contained no means for attribution of contributions—i.e., it required no records to show an original contribution was ever received from the contributor to whom a transferred contribution is attributed. Paragraph (2) of subdivision (d) has been added (at page 2, line 17) to address this concern by requiring that a committee maintain either detailed records or copies of verified and filed campaign reports showing the original contribution on which basis attribution to that contributor is made.

Decision 1—Whether to require disclosure of attributed contributions. At the pre-notice discussion in May, questions were raised regarding whether committees should be required to disclose on campaign reports the contributors to whom transferred campaign funds are attributed. Under existing law, a committee making a transfer must report “the amount and source of any miscellaneous receipt.”² (Government Code section 84211.) For this reason, no change to the regulation would be necessary to require a committee to disclose the lump-sum amount being transferred, along with the name of the transferring committee and the date of the transfer. The Commission would need to add a provision to the regulation if it decided to require disclosure of attributed contributors.

Arguments against disclosure. At the May Commission meeting, concerns were expressed that the address, occupation and employer information the transferring committee has on hand may be inaccurate given the potential lapse in time since the original contribution, and that this information may confuse rather than inform the public. The requirement that a committee maintain records of contributors to whom transferred funds are attributed would provide a sufficient basis for enforcement. Mandatory reporting of attributed contributors, at first blush, would seem to serve the purpose of disclosure by providing voters with information on who is supporting a given candidate. But examined more closely in this context, disclosure could actually mislead contributors in those instances where former supporters of a candidate either no longer actively support the candidate, or in fact support his or her opponent, but nonetheless are reported as attributed contributors to the campaign.

Arguments for disclosure. The potential for disclosure to mislead may be overstated. Disclosure would allow the public to scrutinize transfers and monitor whether contributors to whom a transfer has been attributed subsequently make contributions in violation of Proposition 34. This information, if required by the Commission, could be disclosed on the Form 460, Schedule A, in the same manner in which contributions made through an intermediary are disclosed (See attached example.) At least one

² See Attached Form 460, Schedule I for example

political law firm providing electronic reporting services to their clients has pointed out that, as electronic reporting and committee records have to a degree become merged in some software packages, requiring disclosure on campaign reports makes it easier for candidates to monitor their own contribution limits. Finally, in the two analogues available as guidance on this question—contributions through an intermediary³ and transfers in the Proposition 73 special election context—disclosure on campaign reports is required.

Balancing these considerations, **staff recommends the Commission require disclosure of attributed contributors by adopting the language provided in paragraph (3) of subdivision (d) on page 2, lines 26-30.**

Decision 2--Disclosure of address, occupation and employer. Questions also arose at the May meeting concerning the usefulness of requiring disclosure of the address, occupation and employer of contributors to whom transferred funds are attributed, again citing the potential for inaccurate information when a transfer is performed years after the original contribution for which the information was first collected. The regulated community has not objected to disclosing this information and, in fact, one vendor has expressed concern that not requiring this information may cause them to rewrite their software to strip it from reports. This same vendor points out that its software is designed to display the most current address on record for the contributor to whom a contribution is attributed. For these reasons, **staff recommends the Commission adopt the language in Decision 2 requiring address, occupation and employer be disclosed on campaign reports.**

Decision 3--Limiting transfers of concurrently raised funds to LIFO attribution method.

Options a and b under Decision 3 were drafted to prohibit a committee from attempting to use the FIFO method of attribution to disclose a transfer of contributions recently collected because of that method's susceptibility to manipulation. For example, a candidate could file a notice of intention to run for elective state office, collect a contribution from Contributor L into another committee, then transfer that contribution to the elective state office committee using FIFO to attribute it to Contributor A, and accept *another* contribution from Contributor L directly to the elective state office committee. While the Commission recognized the potential for abuse here, several Commissioners also expressed concern that the choice between LIFO and FIFO was expressly provided in Section 85306. The Commission directed staff to draft language that would prohibit any attribution of concurrently raised contributions that would circumvent the contribution limits of Proposition 34.

The language proposed in **Decision 3, Option c** was drafted to prohibit a transfer of funds raised after the date the receiving committee qualified as a committee (collected or spent \$1,000) if the contributions received after that date would violate Proposition 34 if made directly to the receiving committee. This

³ Section 84302 provides, in pertinent part, "The recipient of the contribution shall include in his campaign statement the full name and street address, occupation, and the name of the employer, if any, or the principal place of business if self-employed, of both the intermediary and the contributor."

language attempts to address concerns over prohibiting a method of attribution expressly allowed by Section 85306, and uses language that states its purpose clearly: a transfer cannot be employed to violate the contribution limits.

Each option is vulnerable to the argument that it contradicts the unconditioned authority provided by Section 85306: “Contributions transferred shall be attributed to specific contributors using a ‘last in, first out’ or ‘first in, first out’ accounting method.” While **Option c** makes no mention of the method of attribution, it prohibits a transfer altogether where it would result in a circumvention of the contribution limits. This option limits the choice between LIFO and FIFO granted by Section 85306, although the language of the prohibition makes the case for its necessity. Should the Commission wish to choose one of these alternatives, however, Section 83112 gives it the authority to adopt regulations to carry out the purposes and provisions of the Political Reform Act. **Staff recommends the Commission not adopt a limitation of any kind in this area.**

Decision 4—Delayed operative date for candidates for statewide elective office. Section 83 of Proposition 34 provides as follows:

This act shall become operative on January 1, 2001. However, Chapter 5 (commencing with Section 85100) of Title 9 of the Government Code, except subdivision (a) of Section 85309 of the Government Code, shall apply to candidates for statewide elective office beginning on and after November 6, 2002.⁴

The next statewide general election takes place on November 5, 2002. The effect of this language is to delay the application of all but one subdivision of Chapter 5 to candidates for statewide elective office until the day after the next statewide general election. Since Section 85306 falls under this delayed operative provision, proposed Regulation 18536 should be delayed in its application to these candidates as well.

At the Commission’s May meeting, questions arose whether this regulation should apply to committees formed for the November 5, 2002 election that continue in existence on November 6, 2002 (as virtually all will to pay accrued expenses, collect contributions for debt repayment, etc.). Subsequently, the Commission decided in June not to apply 85316, the debt fundraising provision of Proposition 34, to a legislative candidate’s committee formed for an election held prior to the

⁴ Proposition 34 was Chapter 102, Statutes of 2000. Senate Bill 34, currently pending in the state Assembly, would amend this language as follows: “This act shall become operative on January 1, 2001. However, *Article 3 (commencing with Section 85300), except subdivision (a) of Section 85309, Article 4 (commencing with Section 85400), and Article 6 (commencing with Section 85600) of Chapter 5 (commencing with Section 85100)* of Title 9 of the Government Code, ~~except subdivision (a) of Section 85309 of the Government Code,~~ shall apply to candidates for statewide elective office beginning on and after November 6, 2002.”

proposition's January 1, 2001, effective date. Extending that thinking to Section 85306 and this regulation, the Commission might elect not to apply these transfer rules to a statewide elective office committee formed for the November 5, 2002 election, even if the transfer in question is performed after that date. This is a reasonable interpretation of Section 83 that would avoid the anomalous result of rendering contributions that would be allowable on November 5, 2002, violations of the Act on November 6, 2002.

Commission authority. The language of **Option a** was drafted in part to anticipate issues that will inevitably arise regarding “retroactive” application of Chapter 5 to committees for 2002 statewide offices. This approach is paralleled by the Legislature’s proposed addition of Section 85321, a section that would allow elective state office candidates to collect contributions for pre-2001 debt repayment in amounts not subject to the Proposition 34 contribution limits.⁵

Although the Commission voted, in the context of Regulation 18531.6, to apply Section 85316 to only those legislative candidates elected on or after January 1, 2001, it did not reach the question of the delayed operation of that section to statewide elective office candidates. Staff recommends that the Commission’s decision here conform to its action on Decision 3 of the staff memo discussing Regulation 18531.6. In both instances, **staff recommends Option a.**

⁵ Senate Bill 34 (Burton) as amended June 4, 2001.